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BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

ELLENSBURG WATER COMPANY,	)	
	)	
Appellant,	)	PCHB NO. 86-232
	)	
v.	)	
	)	FINAL FINDINGS OF FACT,
STATE OF WASHINGTON, DEPARTMENT	)	CONCLUSIONS OF LAW
OF ECOLOGY,	)	AND ORDER
	)	
Respondent.	)	

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On December 22, 1986, the Ellensburg Water Company filed an appeal with the Pollution Control Hearings Board ("Board") contesting the State of Washington Department of Ecology's ("DOE") issuance of Order No. DE 86-C296 to cease and desist application of aquatic herbicides to waters of the Town Ditch Irrigation Canal pending certain actions. This appeal is PCHB No. 86-232.

On May 6, 1987, a formal hearing was held in Yakima, Washington. Board members present were: Judith A. Bendor (Presiding), Lawrence J. Faulk (Chairman) and Wick Dufford. Attorney Donald H. Bond of

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
PCHB NO. 86-232

(1)

1 Halvorson & Applegate represented appellant Water Company. Assistant  
2 Attorney General Allen T. Miller, Jr. represented DOE. Court reporter  
3 Malinda Avery of Jackie Adkins & Associates (Yakima) recorded the  
4 proceedings. Briefs and memoranda were reviewed; oral argument was  
5 made. Evidence was heard and received. Additional evidence was  
6 received on May 18, 1988 and admitted without objection. Based on the  
7 foregoing, the Board makes these:

8 FINDINGS OF FACT

9 I

10 Appellant Ellensburg Water Company ("Water Company") is a private  
11 non-profit Washington corporation owned and operated by farmers. It  
12 provides irrigation waters to farms in Kittitas County. The Town Ditch  
13 Irrigation Canal is part of that irrigation system. Its headworks  
14 withdraws water from the Yakima River, and miles downstream the Ditch  
15 discharges the waters into the Whipple Wasteway. Along the way there  
16 are numerous creeks which the canal passes over. It also intersects a  
17 few creeks. There are irrigation diversion ditches from the Canal.

18 II

19 The Water Company has annually applied acrolein, a herbicide, to  
20 the Town Ditch to control the growth of moss and other aquatic plants.  
21 Acrolein is highly toxic to fish and other aquatic life, and is acutely  
22 toxic at concentrations as low as 68 parts per billion and chronically  
23 toxic at 21 ppb.

1 A trade name for the acrolein applied to the Ditch is Magnacide H  
2 Herbicide. The Magnacide label contains general directions for  
3 application, including the following:

4 [ . . . ] This material should only be applied in  
5 accordance with directions in the MAGNACIDE H Herbicide  
6 Application and Safety Manual by a certified applicator  
7 or under a certified applicators supervision. Do not  
8 permit dairy animals to drink treated water. Do not use  
9 where waters will either flow into or transfer via  
10 underground streams to potential sources of drinking  
11 water. Do not release treated water for 6 days after  
12 application into any fish bearing waters or where it will  
13 drain into them. (Emphasis added)

### 10 III

11 In June 1986, in PCHB No. 84-204 the Water Company and DOE  
12 stipulated to an Order of Dismissal with conditions dealing with  
13 alleged violations in 1984 of state water pollution regulations in  
14 applying acrolein to the Town Ditch. The Stipulated Order required  
15 the Water Company to evaluate the Ditch's structural and hydraulic  
16 characteristics and:

17 Based on the evaluation, make structural improvements or  
18 operational changes necessary to prevent the discharge of  
19 herbicide treated waters to the [adjacent] creeks in  
20 excess of label or special local needs permit  
21 requirements. Ellensburg Water Company v. DOE, PCHB No.  
22 84-204 (Order of Dismissal, June 23, 1986, at parag. 2).

23 The Order also required the Company to prepare and submit to DOE a  
24 report on the data gathered, and required the Company to address the  
25 capacity of the irrigation system to hydraulically retain the

1 herbicide-treated water long enough to satisfy labeling requirements.

2 IV

3 In July 1986 acrolein was applied to the Ditch for the following  
4 purposes: to determine compliance with the Stipulated Order, to treat  
5 the Ditch for unwanted plant growth (as had been done annually), and  
6 to support the Company's application for a "special local needs"  
7 registration (to thereby permit future applications with less than 6  
8 days retention time). On July 7, 1986, the Water Company, in the  
9 presence of DOE personnel and chemical company representatives,  
10 conducted a dye test in the Town Ditch to determine, in part, if there  
11 were any leaks from the Ditch and to calculate the water's speed. Dye  
12 was applied in the Ditch at a point below the crossing of Highway 97,  
13 at Mile 3 below the intake headworks. The test showed that the water  
14 traveled at approximately 1 mile per hour, and took approximately 27  
15 hours to travel from this application point to the Ditch's discharge  
16 into the Whipple Wasteway. Several leaks were detected, including  
17 ones into Naneum Creek (7:50 hours after application) and into Parke  
18 Creek. DOE informed the Company about these and other leaks. Fish  
19 were seen in the Ditch, including rainbow trout, dace and shiners.  
20 The Company tried to fix the leaks.

21  
22 V

23 On July 8, 1986, with DOE and chemical company personnel again

1 present, acrolein was applied to Town Ditch waters at 7:25 a.m.  
2 Within five minutes of application stressed and dying fish were seen  
3 in the Ditch, and as the herbicide-laden waters flowed downstream,  
4 more fish were found stressed and dying in lower reaches of the  
5 Ditch. These fish included chinook salmon, rainbow trout, whitefish,  
6 shiner and dace. DOE requested permission to inspect the headworks of  
7 the Ditch to determine if fish were entering there from the river into  
8 the irrigation system, but the landowner denied access.

9 During this acrolein application an irrigation diversion was left  
10 open. Herbicide laden waters entered the irrigation ditch through the  
11 diversion, and eventually flowed into Naneum Creek near Highway I-90.  
12 Tests detected the presence of acrolein in Naneum Creek. Acrolein  
13 laden waters also leaked into Parke Creek. On July 9, 1986, acrolein  
14 was again applied to the Town Ditch, this time 100 yards below Caribou  
15 Creek. A leak was again detected at Parke Creek.

## 16 VI

17 Prior to the July 1986 acrolein applications, the Water Company  
18 had not applied for nor received a temporary water quality  
19 modification from DOE. It had also not received a State of Washington  
20 Department of Agriculture special local needs permit to allow  
21 discharge of acrolein-laden waters with less than 6 days retention  
22 time.

VII

On December 9, 1986, the Department issued Order No. DE 86-C296. At the time the Order was issued, Doe has not received any report from the Water Company pursuant to the Stipulation on the data gathered in July. Also, no special local needs permit varying the permissible detention time had been issued.

The Order alleges that the July 8, 1986 acrolein application in the Town Ditch violated RCW 90.48.080 when treated waters were allowed to enter Naneum and Parke Creeks. The Order requires the Water Company to:

Cease and desist the use and application of aquatic herbicides to waters of the Town Ditch Irrigation Canal until such time that a report, submitted to and approved by the Department of Ecology, clearly demonstrates that the Town Ditch can be treated with aquatic herbicides such that aquatic organisms residing in state's waters will not experience acute or chronic toxic effects, and that the herbicide application will be in continuous compliance with herbicide label requirements during normal and routine aquatic herbicide applications. This order supercedes all previous orders issued to the Ellensburg Water Company.

One purpose of the Order is to stimulate action which was previously required in the Stipulation. The Water Company filed a timely appeal, which became our PCHB No. 86-232.

Any Conclusion of Law deemed to be a Finding of Fact, is hereby adopted as such. From these Findings of Fact, the Board makes these

FINAL FINDINGS OF FACT,  
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1 CONCLUSIONS OF LAW

2 I

3 The Pollution Control Hearings Board has jurisdiction over these  
4 appeals. Chapt. 43.21B RCW.

6 II

7 The Ellensburg Water Company is a "person" within the meaning of  
8 Chapt. 90.48.RCW. The Department of Ecology is a State of Washington  
9 regulatory agency with the authority to administer and enforce the  
10 State's water pollution control laws, including Chpt. 90.48 RCW.

11 III

12 The herbicide acrolein is a highly toxic pollutant. "Pollution"  
13 under 90.48.020 is defined to include alteration of waters of the  
14 state in such a way as "is likely to . . . render such waters  
15 harmful". The definition, thus, includes the detrimental potential of  
16 discharges. It is not necessary that harm itself be shown for a  
17 discharge to constitute pollution. Moreover, RCW 90.48.080 prohibits  
18 discharge which "shall cause or tend to cause pollution." Again,  
19 harmful potential is proscribed.

20 IV

21 The adjacent streams and creeks and Whipple Wasteway are "waters  
22 of the state" under the State's regulatory water pollution statute.  
23 Chapt. 90.48 RCW. See, CH20, Incorporated v. DOE, PCHB Nos. 84-182  
24

1 and 85-66; Myer v. DOE, PCHB No.83-13; and Courtwright Cattle Company  
2 v. DOE, PCHB No. 83-11. These waters of the State are "Class A"  
3 waters under state water quality standards. WAC 173-201-070(6).  
4

5 V

6 State law regulation allows for temporary water quality  
7 modification on a short-term basis for a specified water body when  
8 necessary to accommodate essential activities. A herbicide  
9 application may be granted modification, subject to conditions,  
10 including:

- 11 1. application shall be in accordance with regulations;
- 12 2. application shall be in accordance with label provisions  
13 promulgated by the U.S. Environmental Protection Agency  
14 under the Federal Insecticide, Fungicide and Rodenticide  
15 Act, as amended, (7 U.S.C. 136, et seq., "FIFRA"); and
- 16 3. any additional conditions DOE may prescribe. WAC  
17 173-201-035(8)(e).

18 Under DOE's regulatory scheme, failure to comply with the labeling  
19 requirements constitutes a violation of even a temporary water quality  
20 modification requirement, and, therefore, an act causing or tending to  
21 cause pollution. Moreover, there was no special local needs  
22 registration permit in effect, as provided for under Section 24(c) of  
23 FIFRA, to permit deviation from the 6 day label requirements.  
24



1 VI

2 As alleged in Order No. DE 86-C296, we conclude that the Water  
3 Company's July 8, 1986 acrolein application violated state water  
4 pollution laws, RCW 90.48.080, when these polluted waters entered  
5 Parke and Naneum Creeks, and Whipple Wasteway, without 6 days  
6 retention time. Moreover, we also conclude that given the irrigation  
7 system's capacity, there is a substantial potential that future  
8 applications will violate Chapt. 90.48 RCW and regulations, because  
9 the Town Ditch does not have 6 days retention capacity prior to  
10 discharge in Whipple Wasteway. The harmful potential test of RCW  
11 90.48.080 has been amply demonstrated.

12 VII

13 The Board reviews Regulatory Orders under a de novo standard, to  
14 determine whether the Department's enforcement order was lawful. See,  
15 Protect Ludlow Bay Committee v. DOE, et al., PCHB No. 84-89. It is  
16 the Department's enforcement discretion whether to issue its  
17 regulatory order under RCW 90.48.120(1) or (2). DOE has the authority  
18 to issue a regulatory order without prior notice, RCW 90.48.120(2).  
19 Such decision is not reviewable by this Board. Rather, the issue  
20 before the Board is whether the Order is "appropriate under the  
21 circumstances" to "accomplish the purposes of Chapter 90.48 RCW." RCW  
22 90.48.120(2). The predicate for an Order is whether any person "shall  
23 violate or creates a substantial potential to violate the provisions  
24

1 of this chapter, or fails to control the polluting content of waste  
2 discharged or to be discharged into any waters of the state . . ."  
3 RCW 90.48.120(1). We also conclude that the facts amply support the  
4 issuance of an Order under RCW 90.48.120. Moreover, the Order merely  
5 commands that which the Company had already stipulated to do, and must  
6 do to comply with the law even had a temporary water quality  
7 modification been in effect.

#### 8 VIII

9 Appellant argues that DOE supervised and acquiesced to the July 8  
10 event that forms the basis of this Order, and is therefore somehow  
11 estopped from assisting the Order. There is no evidence that DOE  
12 agreed to violation of the Stipulation or the application  
13 requirements. To the contrary, during the dye test DOE alerted the  
14 Company to leaks. The Department may have failed to clearly  
15 communicate at times, but such silence does not invalidate this  
16 regulatory Order. All the Order commands is that the Water Company  
17 demonstrate its ability to comply with Chapt. 90.48 RCW and Chapt  
18 173-201 WAC. The July events did not demonstrate such compliance.

#### 19 IX

20 Appellant has requested relief herein, to have the Board issue a  
21 waiver to allow the acrolein-laden waters to be retained for less than  
22 the 6 days which are required by state law. That issue is not  
23 properly before this Board in this appeal. The Board has the power to  
24

1 affirm or deny DOE's Order to cease and desist application of  
2 herbicide. Whether the Department of Agriculture should issue a  
3 special needs permit is an issue not before this Board.


4 Any Conclusion of Law deemed to be a Finding of Fact is hereby  
5 adopted as such. From these Conclusions of Law the Board enters this  
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ORDER

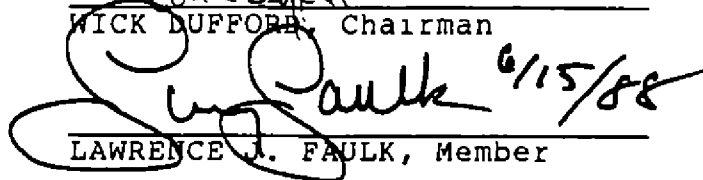
DOE Order No. DE 86-C296 is AFFIRMED.

SO ORDERED this 16th day of June, 1988.

POLLUTION CONTROL HEARINGS BOARD

 6/16/88  
JUDITH A. BENDOR, Presiding

  
WICK DUFFORD, Chairman

 6/15/88  
LAWRENCE J. FAULK, Member

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